

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CARL FREY)	
Claimant)	
VS.)	
)	
ALL STATES WINDOWS & SIDING, LLC)	Docket No. 1,036,927
Respondent)	
AND)	
)	
AMCO INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the February 26, 2009, Award of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant argues that he was a statutory employee of respondent and, further, that respondent is equitably estopped from denying that the Kansas Workers Compensation Act applies to this matter.

Claimant appeared by his attorney, Scott J. Mann of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on June 19, 2009.

ISSUES

1. Was claimant an employee of respondent on the date of accident, or was claimant an independent contractor? Claimant argues that he was a statutory employee of respondent on the date of accident as he was performing work that was an integral part of respondent's trade or business, work which was also performed by respondent's employees. Respondent contends the evidence supports a finding

that claimant was an independent contractor and, therefore, responsible for his own workers compensation insurance.

2. Does the doctrine of equitable estoppel as applied by the ALJ estop respondent and its insurance carrier from denying the Workers Compensation Act applies to this claim?

FINDINGS OF FACT

Claimant owned and operated a construction and remodeling business called Popeye & Associates Home Repair, LLC. He had two to three employees working for him in 2007. In June 2007, claimant and his employees were hired to install siding and windows for respondent. Respondent is a business that sells and installs windows, siding and doors for residential buildings. Respondent provided the projects, siding and windows and negotiated the price for installation. Respondent also collected the money from the jobs, paying claimant by the square foot per job. Respondent also provided a list of policies for claimant and his crew to follow. The list detailed the type of job, the material to be used, how big the job was and how it was to be paid. Claimant and his crew also wore company t-shirts and hats and carried a company sign to each job, all representing respondent's company. When claimant began working for respondent, he quit working for other companies.

Claimant was required to provide respondent with proof of general liability insurance before he could begin the job. When claimant received his first payment from respondent, \$280.42 had been deducted from the gross amount. Claimant was advised that respondent would be deducting 15 percent from each check for workers compensation insurance for claimant and his crew.

On September 4, 2007, claimant was installing siding on a house when the stepladder he was standing on slipped out from underneath him and he fell, injuring his left foot and ankle. The parties have stipulated that claimant suffered a 20 percent impairment to his left lower leg as a result of this injury, pending a finding by the Board that the claim is compensable. Claimant reported the accident on September 5, 2007. He later went into the office of Kim Keeter, respondent's finance manager, and the wife of Chris Keeter, respondent's owner, at Ms. Keeter's request, and claimant and Ms. Keeter filled out paperwork and submitted the matter to respondent's workers compensation insurance company. Claimant testified that he had never carried workers compensation insurance on himself or his employees. The companies he worked for had always carried workers compensation insurance.

Lawrence Stitt, respondent's production manager, negotiated the contact with claimant's company. Mr. Stitt testified that all subcontractors were required to have both workers compensation insurance and general liability insurance. Claimant provided a form purporting to verify the insurance. But it was later determined that claimant did not have workers compensation insurance. Mr. Stitt stated that subcontractors were not required to wear the company's shirts or display the signs, but they were encouraged to do so. Subcontractors were paid piecemeal, by the job, and no withholding taxes were taken out of their checks. Respondent controlled the end result of the job, but not how the job was to be done. Subcontractors provided their own trucks, trailers and tools. Respondent also conducted an inspection of the job when the subcontractor indicated the work was completed.

Kim Keeter testified that claimant was a subcontractor hired in approximately July of 2007 to handle some of respondent's jobs. Subcontractors were paid by the job. When claimant began, he was to purchase his own workers compensation insurance and provide proof of the insurance. The form provided by claimant was initially represented as proof of workers compensation insurance but was not actual proof. From this record, it appears that, before September 4, 2007, claimant's date of accident, respondent withheld money from every one of claimant's checks. Ms. Keeter testified that claimant was to purchase workers compensation insurance and upon providing proof of the insurance to respondent, claimant would be paid the premium amount from the sums withheld from claimant's checks. The monies kept back from claimant were placed in a credit account for claimant. Ms. Keeter denied that respondent ever agreed to provide workers compensation insurance for claimant and his workers. However, she was unable to explain why claimant was allowed to continue performing jobs for respondent without the required workers compensation insurance. Not long after the accident, respondent quit assigning jobs to claimant.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

¹ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

Claimant argues that respondent should be equitably estopped from denying the employer-employee relationship and the fact respondent was to provide workers compensation insurance for claimant and his workers.

Kansas has applied the doctrine of equitable estoppel in workers' compensation proceedings.³ In *Marley*, the Kansas Court of Appeals held a claimant to the terms of his written agreement with respondent by finding claimant was estopped from denying he was an independent contractor.

The doctrine of equitable estoppel requires consistency of conduct, and a litigant is estopped and precluded from maintaining an attitude with reference to a transaction wholly inconsistent with his or her previous acts and business connections with such transaction.⁴

However, "one who asserts an estoppel must show some change in position in reliance on the adversary's misleading statement. . . ."⁵

A party asserting equitable estoppel must show that another party, by its acts, representations, admissions, or silence when it had a duty to speak, induced it to believe certain facts existed. It must also show it rightfully relied and acted upon such belief and would now be prejudiced if the other party were permitted to deny the existence of such facts⁶

It is not disputed that respondent withheld money from each of claimant's checks from the beginning of their relationship. It is also not disputed that the money was to be used to provide workers compensation insurance for claimant and his employees. What is disputed is whether claimant was to be responsible for the purchase of the insurance or whether respondent was to provide the insurance. Respondent made it clear that claimant was required to have the insurance before jobs would be assigned. However, when the proof of insurance documents failed to show the required insurance, respondent continued to assign work to claimant and his employees. Additionally, when claimant suffered the injury and the matter was reported to Kim Keeter, respondent's finance manager and the

³ *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421 (2000).

⁴ *Marley* at Syl. ¶ 1.

⁵ *In re Morgan*, 219 Kan. 136, 546 P.2d 1394 (1976).

⁶ *United American State Bank & Trust Co. v. Wild West Chrysler Plymouth, Inc.*, 221 Kan. 523, 527, 561 P.2d 792 (1977).

wife of the owner, her response was to fill out a workers compensation form and submit the matter to respondent's workers compensation insurance carrier. Had Ms. Keeter truly believed that claimant was responsible for his own workers compensation insurance, her response should have been considerably different. Respondent's actions in withholding monies from claimant's checks while allowing claimant to continue to work on respondent's jobs is inconsistent with respondent's position that claimant was required to provide proof of workers compensation insurance at the outset of their relationship. The Board finds that respondent was withholding money from claimant's checks for the purpose of obtaining workers compensation insurance for claimant and his workers. Therefore, the Board finds that respondent was responsible for the providing of workers compensation insurance for claimant and his employees.

The doctrine of equitable estoppel requires consistency of conduct. Respondent's actions have not been consistent in their dealings with claimant on the issue of workers compensation insurance. The Award of the ALJ should be affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 26, 2009, should be, and is hereby, affirmed and claimant is entitled to an award for a scheduled injury based on the stipulated 20 percent impairment to his left lower extremity.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge